Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Telecommunications Relay Services and Speech to Speech Relay Services for Individuals with Hearing and Speech Related Disabilities	)	CGB Docket 03-123
	)	
To: The Commission	)	

OPPOSITION TO MOTION TO DISMISS PETITION FOR DECLARATORY RULING AND COMPLAINT CONCERNING THE PROVISION OF VIDEO RELAY SERVICE BY SORENSON COMMUNICATIONS, INC.

Hands On Video Relay Services, Inc. ("Hands On") and Snap Telecommunications, Inc. ("Snap"), by their counsel, and Communication Access Center for the Deaf and Hard of Hearing ("CAC"), CSDVRS, LLC ("CSD"), and GoAmerica, Inc. ("GoAmerica"), by their respective officers (collectively "Petitioners"), submit their opposition to Sorenson Communications, Inc.'s motion to dismiss ("Motion") their May 18, 2007 Petition for Declaratory Ruling and Complaint ("Petition") concerning Sorenson's practices with respect to imposing non-compete clauses on its video interpreter employees and contractors. In support, the following is shown.

Sorenson posits several bases for dismissal of the Petition or the complaint portion thereof. First, Sorenson argues Petitioners lack standing to pursue the Petition. Second, Sorenson argues the Commission historically leaves such matters as contract issues to the local courts. Third, Sorenson alleges the Commission lacks jurisdiction over the subject matter of the Petition because Sorenson is not a common carrier and the Commission lacks

ancillary jurisdiction over this matter. Fourth, Sorenson alleges that it cannot be sanctioned for its alleged anti-competitive conduct because there is no clear rule that it has violated. As we show below, Sorenson has presented no valid argument why the Petition should be dismissed. Rather, the Commission should (1) forthwith declare Sorenson's practice of requiring interpreters to sign non-competition agreements unlawful; and (2) declare all such existing non-compete agreements between providers and interpreters void as against public policy.

Petitioners have standing.

Sorenson -- while cleverly refusing to admit the essential truth of the Petition -- argues that only an interpreter who had signed a non-compete with it would have standing to file the Petition. Motion at note 2. Sorenson, however, cites no authority for such a position. As a fall back, Sorenson asserts Petitioners have failed to show standing by showing any of them have attempted to hire without success a current or former Sorenson VI subject to the non-compete. Again, Sorenson cites no authority to support its assertion.

Petitioners set forth their standing based on the Supreme Court's three-part test set down in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). That test is (1) injury in fact, (2) causation, and (3) redressability. *See also American Library Association v. FCC*, 401 F.3d 489, 492-93 (D.C. Cir. 2005). Petitioners explained that Sorenson's non-compete clause makes it more difficult for them to recruit interpreters due to the threat that Sorenson will sue the interpreters. This is an injury in fact because the more difficult it is to recruit interpreters, the more costly is the recruiting process. Petitioners included the Declaration

of Ronald E. Obray, CEO of Hands On, who confirmed that interpreters Hands On has approached to hire have declined to work for Hands On citing their non-compete agreements. Moreover, the Petition represented that each of the other Petitioners have encountered reluctance of interpreters to accept employment due to their having entered into non-compete agreements with Sorenson. This is injury in fact caused by Sorenson's non-compete that would be redressably by the FCC declaring such non-competes invalid. Sorenson no where explains why Petitioner's demonstration of standing is unavailing. Its claim of lack of standing should therefore be rejected.

Sorenson's argument that an interpreter must come forward claiming injury is likewise unavailing. Plainly interpreters do have standing; but that does not mean other providers who cannot hire those interpreters lack standing. Moreover, requiring an interpreter to come forward risks that interpreter being fired and/or sued by Sorenson. There is no point in making an interpreter take that risk when providers plainly have standing under the *Lujan* test.

Commission concern with private agreements.

Sorenson, this time citing several cases, relies principally on the Commission's long standing reluctance to become involved in private disputes. However, the authorities Sorenson cites are not apposite to this situation, because this matter strikes at the heart of the Commission's TRS regulatory responsibilities. Each of the cases Sorenson cites involved a private matter with little relation to the Commission's regulatory responsibilities. *Northwest Broadcasting*, 12 FCC Rcd 3289 (1997), for example, involved the matter of whether an officer had internal authority to sign an application, not a matter of serious Commission

interest.[1] *WCC Holding Co., Inc.*, DA 07-1557 (March 30, 2007), involved a request for a condition on grant of an assignment of license that the party would assume an interconnection agreement. Although the Commission has authority over interconnection agreements, the procedure for negotiation of such agreements is set forth in Sections 251 and 252 of the Act and FCC Rule Part 51. The holding of *Wireless US, LLC*, 2007 FCC LEXIS 3749 (May 9, 2007), that the Commission will not ordinarily act on matters involving private contracts, is also unremarkable. There the Commission refused to intercede with respect to the division of FCC licensed property in dispute in state court between a former husband and wife.

Sorenson's attempt to reference employment situations specifically is similarly unavailing. In *Amendment of Section 73.202(b) (Miramar Beach, FL)*, 6 FCC Rcd 5778 n.4 (Alloc. Branch 1991), the Media Bureau declined to consider in an allocations proceeding whether the proponent was foreclosed from filing for the proposed station as a result of having entered into a non-compete agreement. Other than having a non-compete agreement in common, there is no similarity with the instant situation where the estimated 80 percent market share VRS provider is attempting to deny video interpreters to its competitors with the public interest detriments (1) that consumers may be denied their choice of video relay service provider, (2) consumers may face substantially increased answer speeds, and (3) rate payers may face increased VRS costs.

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[1]Sorenson also cites *Clarklift of San Jose, Inc.*, 16 FCC Rcd 920 (WTB 20001) which similarly held that the Commission would not examine whether an office manager acted in the scope of his employment in signing an application. The significance of that case to the instant situation is not apparent.

Similarly, the holding in *American Radio Systems*, 13 FCC Rcd 12430 (MMB 2001) that the Commission would not in the first instance consider a complaint of employment discrimination is inapposite. Aside from the fact that such matters are vested in the primary jurisdiction of a separate federal agency, the key distinction between this and each of the other cases Sorenson cites is that the actions alleged therein did not threaten to have the effect of frustrating on an industry-wide basis the intent of statutory and Commission policy, in this case of the achievement of functionally equivalent relay service.

Significantly Sorenson choose not to discuss any of the numerous cases Petitioners cited showing the Commission will intervene in contract matters when its regulatory goals risk being frustrated. *See* Petition at 25-30.

Commission jurisdiction

For many of the same reasons, Sorenson's argument that the Commission lacks jurisdiction over the subject matter of the Petition is fallacious.

Sorenson's argument that it is not a common carrier subject to Section 201 of the Act is curious given that when Sorenson sought certification from this Commission in November of 2002, it represented that the Utah Public Service Commission would shortly certify it as an interexchange carrier. *See* Sorenson Media, Inc. notice to secure FCC/NECA approvals for VRS reimbursement (November 21, 2002). Sorenson bases its view that it is not a common carrier on the 2000 *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 5140, 5174. However, the cited passage goes to whether TRS is "telecommunications" under the technical definition of Section 3(43) of the Act, not whether

TRS providers are common carriers. TRS providers may not strictly be telecommunications carriers under the Act, but they are plainly common carriers. Section 64.605(a)(2)(vii) in fact requires demonstration of common carrier status to receive Commission certification to receive payment for the provision of VRS or IP Relay service. That Sorenson is providing service pursuant to Utah State certification is irrelevant if it is -- and it plainly is -- providing common carrier service. *See Beehive Telephone, Inc. v. BOCs*, 78 Rad. Reg. 2d (P&F) 1376 (1995). In any event whether or not Sorenson is subject to Section 201(b) of the Act, it is certainly subject to the Commission's jurisdiction under Section 225.

Sorenson also cites the DC Circuit's decision in *American Library Association v. FCC*, 406 F.3d 689 (2005), reversing *Digital Broadcast Content Protection*, 18 FCC Rcd 12550 (2003),[2] in support of its claim that the Commission lacks ancillary jurisdiction to declare its non-compete clause void as against public policy. Review of that case, however, supports the Commission's jurisdiction here. In *America Library* the court explained there are two conditions for exercise of FCC ancillary jurisdiction. First, the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of "all interstate and foreign communications by wire or radio." Section 2 of the Act. Second, the subject of the regulation must be "'reasonably ancillary to the effective performance of the Commission's various responsibilities.'" 406 F.3d at 700, quoting *United States v.*

[2]Sorenson's Motion fails to discuss all the other cases Petitioners cited in support of Commission jurisdiction of this matter, thus effectively conceding Commission jurisdiction.

Southwestern Cable Co., 392 U.S. 157, 167 (1968). Both of those requirements are plainly met here. The subject of the Petition, VRS is plainly within the Commission's jurisdiction.

Moreover, interpreters are an essential instrumentality of VRS. The Commission plainly has jurisdiction to protect this instrumentality from monopolization. Thus, while Sorenson is right that the Commission plainly would not have jurisdiction over what interpreters buy at the grocery store, the Commission nevertheless has jurisdiction to ensure that Sorenson not engage in conduct which is likely to hamper functional equivalence. The requested declaratory ruling invalidating interpreter non-competes is necessary to the performance of the Commission's responsibility to ensure functionally equivalent telecommunications service to deaf and hard of hearing persons. If Sorenson is allowed to prevent the free flow of interpreters among providers, it will drive up the cost of interpreters and cause answer speeds to rise, both of which are injurious to the public interest

Complaint portion of the Petition.

Sorenson finally asserts that a complaint will not lie against it based on its interpreter non-competes because the rules do not specifically prohibit such agreements and it would be unfair to penalize it without a clear prohibition. Motion at 7, citing *Trinity Broad. Of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000). Although we believe a complaint will lie against Sorenson, especially with respect to a request for a cease and desist order, Sorenson's position has some merit. As such, and to avoid distracting and delaying resolution of this proceeding, Petitioners hereby dismiss the complaint portion of this Petition.

Based on the foregoing, Petitioners renew their request that the Commission forthwith issue a declaratory ruling that Sorenson's interpreter non-compete agreements are void as against public policy..

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George L. Lyon, Jr., hereby certify that on this 25th day of June, 2007, copies of the foregoing OPPOSITION TO MOTION TO DISMISS PETITION FOR DECLARATORY RULING AND COMPLAINT CONCERNING THE PROVISION OF VIDEO RELAY SERVICE BY SORENSON COMMUNICATIONS, INC. was emailed to the following persons:

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